

Young v Avon Prods., Inc.

2019 NY Slip Op 30940(U)

April 8, 2019

Supreme Court, New York County

Docket Number: 190383/2016

Judge: Manuel J. Mendez

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ
Justice

PART 13

IN RE: NEW YORK CITY ASBESTOS LITIGATION

KIM YOUNG and J.C. YOUNG,
Plaintiffs,

INDEX NO. 190383/2016

MOTION DATE 04/03/2019

- against -

MOTION SEQ. NO. 007

AVON PRODUCTS, INC., et al.,
Defendants.

MOTION CAL. NO. _____

The following papers, numbered 1 to 11 were read on defendant Avon Products, Inc.'s motion for summary judgment:

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1 - 5</u>
Answering Affidavits — Exhibits _____	<u>6 - 8</u>
Replying Affidavits _____	<u>9 - 11</u>

Cross-Motion: Yes No

Upon a reading of the foregoing cited papers, it is Ordered that defendant Avon Products, Inc.'s (hereinafter "Avon") motion pursuant to CPLR §3212, for summary judgment to dismiss plaintiffs' claims and all cross-claims asserted against it, is granted to the extent of dismissing plaintiffs' fifth and twelfth causes of action for conspiracy and loss of consortium. The remainder of the relief sought in this motion, is denied.

Plaintiff, Kim Young, was diagnosed with peritoneal mesothelioma. She is 61 years old. Mrs. Young alleges her exposure - as relevant to this motion - is from Avon talc powder products. Plaintiffs allege that Mrs. Young's use of Avon's talc powder products during the relevant period - from about 1961 through 1999 - caused her peritoneal mesothelioma. Mrs. Young was deposed in this action over the course of two days on March 16 and 17, 2017. Her de bene esse deposition was conducted on July 24, 2018 (Mot. McAtee Aff., Exh. 1 and pp. Woodard Aff., Exhs. B and C).

Mrs. Young identified several different talc products used by her and her family on a daily basis. Mrs. Young specifically identified three Avon talc products, "Unforgettable," "Bird of Paradise" and "Skin So Soft." She testified that her mother used Avon products daily and purchased them for the family. Mrs. Young used the same products as her mother and remembers using them from when she was about four or five years old in 1961 through her mother's death in 1999 (Opp. Woodard Aff. Exh. B, pgs. 133-136, 200 and 206-207). She testified that she used Avon's "Unforgettable" talc from about 1961 through 1999; "Bird of Paradise" talc from about 1970 through 1974; and "Skin So Soft" talc from about 1974 through 1999 (Opp. Woodard Aff. Exh. B, pgs. 155, 167-168, 182, 192-193, 200, 202- 203).

Mrs. Young testified that she applied the Avon talcum powder over her entire body including her arms, torso and legs. She used Avon talc almost daily starting at age four or five. Mrs. Young testified that starting at age ten or eleven, she used Avon talc at least daily after bathing, with an additional use before going out at night with her friends (Opp. Woodard Aff. Exh. B, pgs. 161-163, 190, 212 and Opp. Woodard Aff. Exh. A, pg. 318). She applied the Avon talc by shaking the bottle on her hands and applying the talc to her body, or at times by using a powder puff (Opp. Woodard Aff., Exh. B, pgs. 157-161 and 190). She testified that there were round containers with a powder puff that was used to press the talc powder on to her arms, and that you could see the dust and smell it (Opp.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Woodard Aff., Exh. D, pg. 19). Mrs. Young testified that when she used the Avon talc, it created a "dusty environment" that she would have to clean up, and that when she was a little girl, she would write in it. She testified that she could see the dust in the air and she would breathe it in (Opp. Woodard Aff., Exh. B, pgs. 318-320). She testified that the "dust" was the "talc powder," that if a shaker was used, she could see the residue that was left, and used the residue "to put it wherever needed" (Opp. Woodard Aff., Exh. D, pg. 19).

Plaintiffs commenced this action on December 19, 2016 to recover for injuries resulting from Mrs. Young's exposure to asbestos from talc in the Avon powder products she used, "Unforgettable," "Bird of Paradise," and "Skin so Soft" (Mot. McAtee Aff., Exh. 2). On January 23, 2017, Avon served a "Verified Answer to Plaintiffs' Verified Complaint With Affirmative Defenses" (NYSCEF Doc. #7).

Avon now moves for summary judgment pursuant to CPLR §3212 to dismiss plaintiffs' complaint and all cross-claims asserted against it. It is argued that plaintiffs cannot establish causation because the Avon talc powder used by Ms. Young was not contaminated with asbestos, warranting summary judgment. Avon alternatively argues that plaintiff's fifth cause of action for conspiracy and collective liability/concert of action, eleventh cause of action for punitive damages, and twelfth cause of action for loss of spousal consortium, should also be dismissed as failing to state any sustainable claims.

To prevail on a motion for summary judgment the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (*Klein v City of New York*, 81 N.Y. 2d 833, 652 N.Y.S. 2d 723 [1996]). It is only after the burden of proof is met that the burden switches to the nonmoving party to rebut that prima facie showing, by producing contrary evidence in admissible form, sufficient to require a trial of material factual issues (*Amatulli v Delhi Constr. Corp.*, 77 N.Y. 2d 525, 569 N.Y.S. 2d 337 [1999]). In determining the motion, the court must construe the evidence in the light most favorable to the non-moving party by giving the non-moving party the benefit of all reasonable inferences that can be drawn from the evidence (*SSBS Realty Corp. v Public Service Mut. Ins. Co.*, 253 A.D. 2d 583, 677 N.Y.S. 2d 136 [1st Dept. 1998]).

Avon's argument that plaintiffs are not expected to present any admissible evidence of Mrs. Young's exposure to asbestos does not establish entitlement to summary judgment.

A defendant cannot obtain summary judgment simply by "pointing to gaps in plaintiffs' proof" (*Ricci v. A.O. Smith Water Products*, 143 A.D. 3d 516, 38 N.Y.S. 3d 797 [1st Dept. 2016] and *Koulermos v A.O. Smith Water Prods.*, 137 A.D. 3d 575, 27 N.Y.S. 3d 157 [1st Dept. 2016]). Regarding asbestos, a defendant must make a prima facie showing that its product could not have contributed to the causation of Plaintiff's illness (*Comeau v W. R. Grace & Co.- Conn. (Matter of New York City Asbestos Litig.)*, 216 AD2d 79, 628 NYS2d 72 [1st Dept. 1995] citing to *Reid v. Georgia - Pacific Corp.*, 212 A.D.2d 462, 622 N.Y.S. 2d 946 [1st Dept., 1995], *DiSalvo v. A.O. Smith Water Products (In re New York City Asbestos Litigation)*, 123 A.D. 3d 498, 1 N.Y.S. 3d 20 [1st Dept. 2014] and *O'Connor v. Aerco Intl., Inc.*, 152 A.D. 3d 841, 57 N.Y.S. 3d 766 [3rd Dept., 2017]). Defendants must unequivocally establish that Mrs. Young either was not exposed to asbestos from their products, or that the levels of asbestos she was exposed to was not sufficient to contribute to the development of mesothelioma (*Berensmann v. 3M Company (Matter of New York City Asbestos Litig.)*, 122 A.D. 3d 520, 997 N.Y.S. 2d 381 [1st Dept., 2014]).

Avon argues that plaintiffs have no evidence, and that their experts, Dr. William Longo and Dr. Jacqueline Moline, cannot raise an issue of fact that Mrs. Young was exposed to asbestos through contaminated Avon talc powder products. They also argue that plaintiffs' experts cannot raise an issue of fact on whether Mrs. Young was exposed to sufficient levels of asbestos contamination from the use of Avon products during the relevant periods of about 1961 to 1999.

These arguments amount to “pointing to gaps in plaintiffs’ proof” and are not a basis to obtain summary judgment.

Avon claims that there is no evidence prior to 1971 to establish that the talc sold to Avon was potentially contaminated with asbestos. Avon alleges that starting in 1972, it began implementing a stringent three step quality control procedure to ensure raw talc used in Avon products was asbestos free. Avon’s quality control procedure: (1) required that the supplier provide rigorous testing to certify no asbestos was detected under the J4-1 method; (2) Avon double checked each shipment using infrared spectrometry to screen for asbestiform amphibole; and (3) Avon regularly audited raw talc shipments at independent laboratories using the J4-1 test method.

Avon argues that its own testing and records of formulations establish that for the remaining period of Mrs. Young’s alleged exposure, 1971 through 1999, there was no asbestos contamination in its talc products. Avon claims that there is no admissible non-speculative evidence that Mrs. Young was exposed to asbestos through the use of its product.

Avon relies on the affidavit of its Vice President Lisa Gallo, she worked in the research and development department of the company since January of 1994. Ms. Gallo relies on her review and investigation of documents retained in Avon’s possession. Ms. Gallo states that Avon manufactured and sold “Unforgettable” perfumed talc between 1965 and 1979, “Bird of Paradise” perfumed talc between 1970 and 1979, and “Skin so Soft” satin talc between 1971 and 2001. Ms. Gallo refers to the “Raw Ingredient Specifications” annexed to the motion papers which identify the ingredients, approved suppliers of the ingredients (ie cosmetic talc), and the results of mandatory testing performed by the suppliers of the ingredients (see Mot. McAtee Aff., Exhs. 48-56). Ms. Gallo also claims that in 1976 Avon adopted an industry trade association - the Cosmetics, Toiletries and Fragrance Association (hereinafter “CTFA”) - testing procedure using the J4-1 method for detecting asbestos in cosmetic talc.

Avon claims that there is no asbestos contamination from their products during the period relevant to Mrs. Young’s exposure because: (1) the talc was sourced from “asbestos free” mines, (2) there were internal tests to ensure the lack of contamination and (3) both government and independent tests confirmed the product was asbestos free. It is Avon’s contention that Mrs. Young was not exposed to asbestos through use of Avon products, and that it did not cause her peritoneal mesothelioma.

Avon argues that summary judgment is warranted under *Parker v Mobil Oil Corp.*, 7 NY3d 434, 824 NYS2d 584, 857 NE2d 1114 [2006], *Cornell v 360 West 51st Street Realty, LLC*, 22 NY3d 762, 986 NYS2d 389, 9 NE3d 762 [2014] and in the *Matter of New York City Asbestos Litigation (Juni)*, 32 N.Y. 3d 1116, 116 N.E. 3d 75, 91 N.Y.S. 3d 784 [2018], because plaintiffs are unable to establish general and specific causation.

In support of summary judgment on causation, Avon relies on multiple published articles, studies and reports (Mot. McAtee Aff. Exhs. 6 through 22); and the findings of the Food and Drug Administration (FDA), U.S. Dept. Of Health and Human Services, and the World Health Organization (WHO) (Mot. McAtee Aff. Exhs. 27, 28, 29, 31 and 59). Avon also relies on the expert affidavit of Alan M. Segrave, Professional Geologist (P.G.) (Mot. McAtee Aff. Exh. 41). Avon argues that the reports and affidavit establish that Mrs. Young was not exposed to asbestos through use of their products and that their product did not cause Mrs. Young’s peritoneal mesothelioma. Avon claims that during the periods relevant to Mrs. Young’s alleged exposure, talc was obtained from one of five sources: Val Chisone, Italy; Murphy, North Carolina; Southwest Montana; Alpine, Alabama; and Guangxi, China. Avon argues that all of these mines were known as being “asbestos-free.”

General Causation:

In toxic tort cases, expert opinion must set forth (1) a plaintiff's level of exposure to a toxin, and (2) whether the toxin is capable of causing the particular injuries plaintiff suffered to establish general causation (*Parker v. Mobil Oil Corp.*, 7 NY3d 434, 448, *supra*).

Avon argues that no causal relationship exists between the talc sold to Avon and the development of peritoneal mesothelioma, eliminating any general causation. Avon relies on its "Raw Ingredient Testing Specifications" reports as showing that the product control testing found little or no asbestos in the talc (*Mot. McAtee Aff.*, Exhs. 48-56). Avon's corporate representative, Ms. Lisa Gallo claims that Avon revised the "Raw Ingredient Specifications" in 1972 to require that talc suppliers provide only asbestos free talc and subsequently the FDB of this policy (*Mot. McAtee Aff.*, Exhs. 57-58). Avon refers to the findings of the FDA, U.S. Dept. of Health and Human Services, and the WHO, as showing that consumer exposure to cosmetic talc does not increase the risk of mesothelioma. (*McAtee Aff.* Exhs. 27, 28, 29, 31 and 59).

Avon provides the February 15, 2019 expert report of Mr. Alan M. Segrave, Professional Geologist (P.G.), employed by Maxxam, a Bureau Veritas Group Company (*Mot. McAtee Aff.*, Exh. 41). Mr. Segrave assesses talc from the different locations and mines that provided the talc that Avon used from 1960 through 1999. He states that tremolite asbestos fibers occur in both asbestiform and "non-asbestiform" varieties, and that amphiboles in tremolite are not asbestos or regulated as such. Mr. Segrave states that the Occupational Safety and Health Administration (OSHA) did not make any distinction between asbestos and tremolite fibers until 1992. Mr. Segrave cites to reports and standards from various individuals and entities, including the U.S. Environmental Protection Agency (EPA), and WHO, as further establishing that the talc from mines in various regions that was used by Avon for its talc powder products was not contaminated. Mr. Segrave assesses the geological formations and processes for regions where the talc used in Avon talc powder products was obtained in Montana, Alabama, Italy, North Carolina and China, and concludes that none were contaminated with asbestos.

Plaintiff's argue that the talc used by Avon in its talc powder products was contaminated with asbestos. They claim that the X-Ray Diffraction (XRD), Differential Thermal Analysis (DTA) and APAM testing methods used by Avon as part of its internal quality control procedure were not capable of establishing whether the cosmetic talc used in Avon's powder products was asbestos free.

Plaintiffs rely on the April 21, 2017 Analysis Report of their expert Dr. Edward Longo (*Opp. Woodard Aff.*, Exh. W). Dr. Longo performed Transmission Electron Microscopy (TEM), Selected Area Diffraction (SAED) and Energy Dispersive Spectroscopy (EDXA) on the talc found in two historic samples of Avon's "Unforgettable" perfumed talc, from within the period relevant to Mrs. Young's exposure. Dr. Longo's report analyzed the results of his testing and found asbestos fibers or bundles with at least a 5 to 1 ratio in the "Unforgettable" samples (*Opp. Woodard Aff.*, Exh. W). Dr. Longo testified at his March 14, 2019 deposition that based on Avon's "Ingredient Specifications," he was able to determine that the first sample of "Unforgettable" was from about 1965-1967 (*Opp. Woodard Aff.*, Exh. Y, pgs. 8-9).

Plaintiffs also rely on the November 22, 2017 report of Dr. Jacqueline Moline, M.D., a medical doctor specializing in occupational and environmental disease (*Opp. Woodard Aff.* Exh. BB). Dr. Moline reviewed Mrs. Young's past medical history, cigarette smoking history, occupational and environmental history, and deposition testimony. She refers to studies, reports and findings from OSHA, EPA, the WHO and the Food and Drug Administration (FDA) establishing asbestos as a carcinogen and cause of mesothelioma. Dr. Moline concludes that

Mrs. Young's peritoneal mesothelioma is a result of cumulative exposure to asbestos contaminated talcum powder (Opp. Woodard Aff., Exh. BB).

Avon argues that summary judgment is warranted under *Cornell v. 360 West 51st Street Realty, LLC*, 22 NY3d 762, 986 NYS2d 389, 9 NE3d 762 [2014] because plaintiffs are unable to establish general causation. In *Cornell*, 22 NY3d 762, supra, the defendant-corporation established a prima facie case as to lack of general causation establishing generally accepted standards within the relevant community, of scientists and scientific organizations, that exposure to mold caused disease in three ways, none of which were claimed by the plaintiff. This case is distinguishable because plaintiffs' expert, Dr. Moline, is relying on some of the same scientists and scientific organizations as defendant's experts to show there is general causation.

Summary judgment is a drastic remedy that should not be granted where conflicting affidavits cannot be resolved (*Millerton Agway Cooperative v. Briarcliff Farms, Inc.*, 17 N.Y. 2d 57, 268 N.Y.S. 2d 18, 215 N.E. 2d 341 [1966] and *Ansah v. A.W.I. Sec. & Investigation, Inc.*, 129 A.D. 3d 538, 12 N.Y.S. 3d 35 [1st Dept., 2015]). Conflicting testimony raises credibility issues that cannot be resolved on papers and is a basis to deny summary judgment (*Messina v. New York City Transit Authority*, 84 A.D. 3d 439, 922 N.Y.S. 2d 76 [2011]).

Avon's expert Mr. Segrave, P.G. relies on studies and reports to establish that there is no causal relationship between tremolite fibers in Avon's talc powder products used by Mrs. Young and her peritoneal mesothelioma. Plaintiffs' expert Dr. Moline, also relies on studies and reports, in part from the same scientific organizations, to establish that Mrs. Young's exposure to tremolite asbestos fibers in Avon's talc powder products can cause her peritoneal mesothelioma. These conflicting affidavits raise credibility issues, and issues of fact on general causation.

Special Causation:

Avon states that its talc powder products used by Mrs. Young did not contain asbestos fibers or cause Mrs. Young's peritoneal mesothelioma, and that plaintiffs are unable to establish special causation.

The Court of Appeals has enumerated several ways an expert might demonstrate special causation. For example, "exposure can be estimated through the use of mathematical modeling by taking a plaintiff's work history into account to estimate the exposure to a toxin." The "[c]omparison to the exposure levels of subjects of other studies could be helpful, provided that the expert made a specific comparison sufficient to show how the plaintiff's exposure level related to those of the other subjects" (*Parker v. Mobil Oil Corp.*, 7 NY3d 434, 448, 824 NYS2d 584, 857 NE2d 11114 [2006]). In toxic tort cases, an expert opinion must set forth "that the plaintiff was exposed to sufficient levels of the toxin to cause such injuries" to establish special causation (see *Parker v. Mobil Oil Corp.*, 7 NY3d 434, supra at 448]). In turn, the Appellate Division in the case *In re New York City Asbestos Litigation*, 148 AD3d 233, 48 NYS3d 365 [1st Dept. 2017] held that the standards set by *Parker* and *Cornell* are applicable in asbestos litigation.

Avon provides no expert affidavits or reports to specifically evaluate the epidemiological articles, studies, and reports it provides to establish Avon's talc powder products did not cause Mrs. Young's peritoneal mesothelioma. Avon argues that scientific consensus from epidemiological studies establish there was no general or special causation. Avon does not provide any expert comparison that specifically compares Mrs. Young's exposure to Avon talc powder products, "Unforgettable," "Bird of Paradise" and "Skin So Soft" during the alleged relevant period, to show how her exposure levels related to other subjects, or to perform evaluations of her actual exposure to their talc.

Avon's argument that it is not necessary to provide an expert affidavit or report, because the attorney's affirmation is being used to submit documentary evidence, is unavailing. The documentary evidence and conclusions submitted by Avon's attorney, who is not an expert, are hearsay that have no foundation, and are not "proof in admissible form" (Zuckerman v. City of New York, 49 N.Y. 2d 557, 404 N.E. 2d 718, 427 N.Y.S. 2d 595 [1980]). Furthermore, Avon's submissions do not meet the requirements as stated in Parker v. Mobil Oil Corp., 7 NY3d 434, supra at 448.

Plaintiffs, on special causation, rely on the reports of Dr. Jacqueline Moline, M.D., a medical doctor specializing in occupational and environmental disease and Dr. William E. Longo, employed by MAS, Analytical Services, LLC (Opp. Woodard Aff. Exhs. BB and W).

Dr. Longo analyzed two historic samples of Avon's "Unforgettable" talc powder product. Dr. Longo used a Transmission Electron Microscope ("TEM"), Selected Area Diffraction ("SAED") and Energy Dispersive Spectroscopy ("EDXA"), as a means of determining the presence of asbestos fibers. Dr. Longo's report concluded that Avon's "Unforgettable" talc powder showed four amphibole fibers or bundle structures in 100 grid openings identified as tremolite in sample M66289-001. The second sample M66289-002 had one amphibole fiber counted in 100 grid openings that was identified as tremolite. Dr. Longo prepared tables reflecting the testing results (Opp. Woodard Aff. Exh. W, Tables 1 through 3).

Dr. Moline relies, in part, on Dr. Longo's testing, Mrs. Young's testimony of exposure to Avon's asbestos containing talc powder products, and fiber release studies involving talc powder using the same source mines. Dr. Moline concludes that Mrs. Young's peritoneal mesothelioma was a result of exposure to asbestos contaminated talcum powder (Opp. Woodard Aff., Exh. BB).

Summary judgment is a drastic remedy that should not be granted where issues raised in conflicting affidavits cannot be resolved. It should not be granted when there is any doubt (Insurance Co. of New York v. Central Mut. Ins. Co., 47 A.D. 3d 469, 850 N.Y.S. 2d 56 [1st Dept., 2008] citing to Millerton Agway Cooperative v. Briarcliff Farms, Inc., 17 N.Y. 2d 57, 268 N.Y.S. 2d 18, 215 N.E. 2d 341 [1966]). Conflicting testimony raises credibility issues, that cannot be resolved on papers. They should be determined by a jury instead, and are a basis to deny summary judgment (Prevost v. One City Block LLC, 155 A.D. 3d 531, 65 N.Y.S. 3d 172 [1st Dept. 2017] and Messina v. New York City Transit Authority, 84 A.D. 3d 439, 922 N.Y.S. 2d 70 [1st Dept. 2011]).

The conflicting expert affidavits and construing the evidence in a light most favorable to the plaintiffs as the non-moving party, warrants denial of the summary judgment sought by Avon on causation. Plaintiffs have raised sufficient credibility issues and issues of fact on general and specific causation, requiring a trial of this matter.

Avon's argument that the specific Avon talc powder and bottles of "Unforgettable," "Bird of Paradise" and "Skin So Soft" used by Mrs. Young were not tested and that there is no direct evidence of exposure to asbestos from Avon's talc powder products, is not dispositive. Plaintiffs are not required to show the precise causes of Mrs. Young's damages, but only show facts and conditions from which Avon's liability may be reasonably inferred (Oken v. A.C. & S. (Matter of New York City Asbestos Litig.), 7 A.D. 3d 285, 776 N.Y.S. 2d 253 [1st Dept. 2004], Parker v. Mobil Oil Corp., 7 N.Y. 3d 434, supra at pg. 448, and Cornell v. 360 West 51st Street Realty, LLC, 22 N.Y. 3d 762, 9 N.E. 3d 884, 986 N.Y.S. 2d 389 [2014]).

Plaintiffs cite to Mrs. Young's deposition testimony, that she used Avon talc products daily as a source of her exposure to asbestos from the use of Avon's talc powder products. She described the manner of her exposure through the use of Avon talc products (Opp. Woodard Aff. Exh. , pgs. 161-163, 190, 212 and Opp.

Woodard Aff. Exh. A, pgs. 318-321). Mrs. Young's deposition testimony, when combined with the reports of Dr. Longo and Dr. Moline, creates "facts and conditions from which [Avon's] liability may be reasonably inferred" (*Reid v Ga-Pacific Corp.*, 212 AD 2d 462, *supra*), and raise issues of fact. There remains issues of fact as to whether Avon's talc powder products used by Mrs. Young were contaminated with asbestos, and whether Avon's talc products, "Unforgettable," "Bird of Paradise" and "Skin So Soft" during the relevant period of 1961 through 1999 exposed Mrs. Young to asbestos and caused her mesothelioma, further warranting denial of summary judgment.

Plaintiffs have also raised issues of fact as to the eleventh cause of action for punitive damages. The purpose of punitive damages is to punish the defendant for wanton, reckless or malicious acts and discourage them and other companies from acting that way in the future (*Ross v. Louise Wise Servs., Inc.*, 8 N.Y. 3d 478, 868 N.E. 2d 189, 836 N.Y.S. 2d 590[2007]). To the extent Avon argues it conducted testing and attempted to ensure its talc powder products were asbestos free, that does not preclude the imposition of punitive damages as a deterrent. Plaintiffs' claim that Avon's testing found both chrysotile and tremolite asbestos throughout the 1970's and that Avon continued to advocate for the use of XRD testing that would not be able to find any asbestos. To the extent that plaintiffs argue that Avon placed corporate profits and reputation above the health and safety of Mrs. Young and that Avon's continued insistence that there is no asbestos in its talc powder products "Unforgettable," "Bird of Paradise" and "Skin So Soft," the issue of punitive damages is to be determined by the trial judge after submission of all evidence.

Avon seeks to dismiss plaintiffs' fifth cause of action for conspiracy and collective liability/concert of action arguing that it is not an independent cause of action and there is no evidence of an unlawful agreement.

To establish a claim of civil conspiracy, plaintiff is required to, "...demonstrate the primary tort, plus the following four elements: (1) an agreement between two or more parties; (2) an overt act in furtherance of the agreement; (3) the parties intentional participation in the furtherance of the plan or purpose; and (4) resulting damage or injury." (*Abacus Federal Savings Bank v. Lim*, 75 A.D. 3d 472, 905 N.Y.S. 2d 585 [1st Dept., 2010]).

New York does not generally recognize an independent cause of action for civil conspiracy to commit a tort. Allegations of civil conspiracy are only sustainable to connect the actions of separate defendants with an otherwise actionable tort (see *Blanco v. Blanco*, 116 A.D. 3d 892, 986 N.Y.S. 2d 151 [2nd Dept., 2014] citing to *Alexander & Alexander of New York, Inc. v. Fritzen*, 68 N.Y. 2d 968, 503 N.E. 2d 102, 510 N.Y.S. 2d 546 [1986]).

Plaintiffs have not provided evidence of an unlawful agreement to commit a tort or stated a basis to sustain the fifth cause of action.

Avon seeks to dismiss the twelfth cause of action for spousal loss of consortium arguing that the plaintiff's alleged injuries from the use of Avon's talc powder products occurred before she was married (See *Holmes v. Maimonides Medical Center*, 95 A.D. 3d 831, 943 N.Y.S. 2d 573 [2nd Dept. 2012] citing to *Anderson v. Eli Lilly & Co.*, 79 N.Y. 2d 797, 588 N.E. 2d 66, 580 N.Y.S. 2d 168 [1991]). Mrs. Young testified that all of her exposure to Avon's talc powder products happened when she lived with her mother (Opp. Woodard Aff. Exh. B, pgs. 133-136, 200 and 206-207). Plaintiffs did not provide evidence to raise and issue of fact or otherwise sustain the twelfth cause of action.

ACCORDINGLY, it is ORDERED that defendant, Avon Products, Inc.'s motion for summary judgment pursuant to CPLR §3212 to dismiss plaintiffs' claims and all cross-claims, is granted only to the extent of dismissing the fifth cause of action for conspiracy and collective liability/ concert of action, and the twelfth cause of action for spousal loss of consortium, and it is further,

ORDERED that plaintiffs' claims asserted in the fifth cause of action for conspiracy and collective liability/concert of action and the twelfth cause of action for spousal loss of consortium asserted against Avon Products, Inc., are severed and dismissed, and it is further,

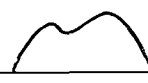
ORDERED that all remaining claims and cross-claims asserted against Avon Products, Inc. remain in effect, and it is further,

ORDERED that the remainder of the relief sought in this motion, is denied, and it is further,

ORDERED that the Clerk of the Court shall enter judgment accordingly.

ENTER:

Dated: April 8, 2019



MANUEL J. MENDEZ
J.S.C.

MANUEL J. MENDEZ
J.S.C.

Check one: **FINAL DISPOSITION** **NON-FINAL DISPOSITION**
Check if appropriate: **DO NOT POST** **REFERENCE**